No. 90-1232

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IN THE

# Supreme Court of the United States

October Term, 1990

SMS DATA PRODUCTS GROUP, INC.,
*Petitioner,*

v.

THE UNITED STATES and
DATA GENERAL CORPORATION,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Federal Circuit correctly held that the General Services Administration Board of Contract Appeals ("Board") interpreted the software licensing specifications of the U.S. Department of Interior's Solicitation No. 7510 contrary to their plain meaning?

## RULE 29.1 STATEMENT

Data General Corporation has no parent companies or subsidiaries (except wholly owned subsidiaries).

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

RULE 29.1 STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 3

I. The Solicitation Provisions Interpreted By The Federal Circuit Have No Significance Beyond The Case At Bar ..... 4

II. SMS Mischaracterizes The Federal Circuit's Statements Regarding The Board's Authority ..... 5

CONCLUSION ..... 7

# TABLE OF AUTHORITIES

**Cases** Page

*GTE Telecom Inc.*, GSBCA Nos. 10986-P, 10987-P, 1991 GSBCA LEXIS 54 (Jan. 24, 1991).....7

*Memorex Corp.*,.GSBCA No. 7297-P, 85-3 BCA¶ 18,289 (1985).....7

*ViON Corp.*, GSBCA No. 10218-P-REM, 1990 GSBCA LEXIS 599 (Oct. 24, 1990).....7

**Statutes**

40 U.S.C. § 759.....5, 6

41 U.S.C. § 253a (1988).....5

**Other**

Rules of Procedure, General Services Administration Board of Contract Appeals.....6

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## BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

The pertinent facts are set forth in the Federal Circuit's decision. SMS' Petition, pp. 1a-16a.[1] Data General will respond here, however, to a number of inaccuracies in SMS' Statement of the Case.

On pages 7-8, SMS states that despite its being the lowest-priced offeror, the contracting officer disqualified its proposal because SMS had proposed licenses which restricted the number of users on the system. SMS was, in fact, found by

[1]Data General will refer to the Petition for Writ of Certiorari as "SMS' Petition." The Federal Circuit's decision is reproduced at pages 1a-39a of SMS' Petition.

the agency to be technically non-compliant for two reasons: (1) it restricted the number of users licensed on the system, and (2) it restricted the use of the back-end database software package to a small percentage of the processors on the system. SMS' Petition, pp. 10a-13a. In addition, as the Federal Circuit found, SMS did not offer the lowest price proposal. Because of SMS' restricted use licenses, the agency's additional costs of purchasing from SMS the additional software licenses needed made Data General's offer the low price. SMS' Petition, pp. 21a, 24a-25a.

On page 11 of SMS' Petition, SMS leaves a misimpression that Data General's expert described as "incredibly stupid" the USGS requirement that server software must be licensed to run on workstations. To the contrary, Data General's expert supported the agency's testimony that there was a need for the database back-end software to be licensed for all workstations, because the agency would likely purchase disks for those workstations to avoid bottlenecks in data processing. SMS' Petition, pp. 33a-36a. The expert's testimony, in response to a question by the SMS attorney, was that it would be "incredibly stupid" to run the back-end software on a *diskless* workstation. As the expert knew, the agency never had such an intent. *Id.*

SMS states that no party to the appeal challenged the Board's finding that none of the offerers had proposed unlimited use software licenses; SMS further contends that the Federal Circuit ignored that finding. SMS' Petition, pp. 12, 13. These contentions are simply untrue. In its Brief for Appellant to the Federal Circuit, Data General challenged at length the Board's erroneous conclusion that Data General had not proposed unlimited use site licenses. Brief for Appellant, pp. 31-34, 44-46. Data General showed that the Board's contrary conclusion was based on its misinterpre-

tation of the language of the solicitation; the same misinterpretation by the Board was applied to Data General's proposal. *Id.* Moreover, the Federal Circuit rejected the Board's finding when it stated that Data General, SMS, and Lockheed had all submitted technically compliant proposals. SMS' Petition, p. 9a. To be technically compliant, Data General had to meet the software licensing requirements. Subsequently, only SMS changed its licensing provisions, rendering SMS' previously compliant proposal non-compliant. Indeed, once the Federal Circuit corrected the Board's interpretation of the solicitation's licensing requirements, the compliance of Data General's proposal was no longer an issue: Data General expressly stated in its proposal that it would provide the unlimited licenses required by the solicitation. Brief for Appellant, pp. 31-34.

On page 13 of SMS' Petition, SMS incorrectly states: "the [Federal Circuit] held that the *Board* had exceeded its jurisdiction by insisting that USGS clearly and unequivocally state its technical specifications." The Federal Circuit's holding was that the Board had erred as a matter of law in its interpretation of the solicitation's licensing provisions. The Federal Circuit added that to the extent the Board's misinterpretation of the solicitation resulted from the Board's substitution of its own views of the agency's automatic data processing needs, the Board had exceeded its statutory authority. SMS' Petition, pp. 37a-39a. Nowhere, contrary to SMS' assertion, did the Federal Circuit state that the Board had exceeded its jurisdiction by insisting that the agency state its technical requirements clearly.

## REASONS FOR DENYING THE WRIT

The Federal Circuit's decision is based on an interpretation of the specific and unique provisions of Interior Depart-

ment Solicitation No. 7510 for automatic data processing systems, and an offeror's (SMS') proposal in response thereto.

In its attempt to make the case appear worthy of Supreme Court review, SMS has focused on a peripheral issue relating to the Board's jurisdiction, one which the Supreme Court would not find dispositive of the case. Moreover, SMS has framed that issue of the Board's jurisdiction — and the Federal Circuit's statements with regard thereto — inaccurately. The Federal Circuit decision does not impact the Board's jurisdiction to hear protests challenging the legality of solicitation requirements.

## 1. The Solicitation Provisions Interpreted By The Federal Circuit Have No Significance Beyond The Case At Bar

This case is a dispute between the companies who responded to a solicitation of the U.S. Department of Interior for the acquisition of automatic data processing systems. The licensing provisions of that solicitation were unique to the procurement. The agency disqualified SMS because SMS failed to comply with what the agency believed were the clearly stated requirements of the solicitation. The Board, however, interpreted the licensing provisions of the solicitation differently and found that SMS should not have been disqualified. On appeal, the Federal Circuit held that the Board's interpretation had departed from the plain meaning of the solicitation's requirements and reinstated that award to Data General.[2]

As is evident from a reading of the Federal Circuit's decision, the correct interpretation of the solicitation's licensing requirements and SMS's proposals in response thereto was

[2] "The [software licensing] provision could not be clearer." SMS' Petition, p. 20a.

grounded in the particular language of the solicitation and the actions of SMS and the agency during the procurement. These are not matters of unusual importance or widespread impact such that Supreme Court review is appropriate; to the contrary, these interpretational issues have no apparent significance except to those who are parties to the dispute.

## II. SMS Mischaracterizes The Federal Circuit's Statements Regarding The Board's Authority

SMS' Petition is premised on an incorrectly framed issue and a misconception of the Federal Circuit's decision. SMS characterizes the Federal Circuit's decision as concluding "that the Board has no jurisdiction to enforce those portions of CICA which deal with specifications." SMS' Petition, p. 22. The Federal Circuit said no such thing. The distinction which SMS totally overlooks is that the Board's jurisdiction is limited to correcting agency actions which are not in compliance with statute or regulation, 40 U.S.C. § 759(f)(1) and 759(f)(5)(B); where there is no violation of statute or regulation, the Board may not interfere with the agency's procurement actions, including the agency's solicitation requirements. *Id.*

There can be no doubt, as SMS states, that the Board has jurisdiction to review an agency's technical specifications for compliance with statute and regulation. In preparing its technical specifications, the agency must comply with the CICA requirements that it "specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement" and to "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." 41 U.S.C. §§ 253a(a)(1)(A), 253a(a)(2)(B) (1988). SMS' Petition, pp. 18, 20. Under the Board's rules, a challenge to the clarity

of a solicitation's provisions or an allegation that those provisions are unduly restrictive must be brought prior to the closing date for receipt of initial proposals.[3] In this case, there was no protest filed by SMS or any other party alleging that the solicitation's licensing requirements were unduly restrictive or otherwise illegal. There has never been any dispute as to the legality of the software licensing requirements.

SMS' protest was brought because of its disqualification from the competition due to its failure to comply with the solicitation's licensing requirements. The issues were the proper interpretation of the solicitation and of SMS' proposal. The Board's review was not of the legality of the licensing requirements, but rather their proper interpretation and SMS' compliance therewith. It was in this context that the Federal Circuit stated, and correctly so, that the Board could not base its decision on the substitution of its own views for those of the agency as to the *wisdom* of the agency's licensing requirements. Where there is no question of the legality of the agency's technical specifications, the Board's statutory role is at an end.

Nor is there a conflict between sections 759(e) and 759(f) of the Brooks Act, 40 U.S.C. § 759. Section 759(f) gives the Board authority to act where there is a violation of statute or regulation. Section 759(e) confirms that in the absence of such violation, the Board may not interfere. The Board itself recognizes the limitation which section 759(e) places on its actions:

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[3]Rule 5(b)(3)(i) of the Board's Rules states:

> A protest based upon alleged improprieties in any type of solicitation which are apparent before bid opening or the closing time for receipt of initial proposals shall be filed before bid opening or the closing time for receipt of initial proposals.
>
> ....

> [S]ubsection (g) of the Brooks Act [now 40 U.S.C. § 759(e)] instructs the Administrator that he may not "impair or interfere with the determination by agencies of their individual automatic data processing requirements." So long, therefore, as we are in an area where an agency has *legitimately* determined its requirements, we cannot interfere.

*Memorex Corp.*, GSBCA No. 7927-P, 85-3 BCA ¶ 18,289 (1985) at 91,787 (emphasis in original).

Moreover, the Board has not interpreted the Federal Circuit's decision as an infringement upon its jurisdiction to consider protests of allegedly illegal technical specifications. Since the issuance of the Federal Circuit's decision on October 9, 1990, the Board has continued to hear and decide such protests. *See, e.g., GTE Telecom Inc.*, GSBCA Nos. 10986-P, 10987-P, 1991 GSBCA LEXIS 54 (Jan. 24, 1991); *ViON Corp.*, GSBCA No. 10218-P-REM, 1990 GSBCA LEXIS 599 (Oct. 24, 1990).[4]

## CONCLUSION

SMS is simply incorrect in contending that the Federal Circuit's decision makes improper inroads on the Board's authority. Rather, the decision reminded the Board that in the absence of a violation of statute or regulation, the Board cannot base its decisions on its own views of the agency's data processing needs — a restriction recognized by the Board but seem-

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[4]Even assuming *arguendo* that the Federal Circuit incorrectly characterized the Board's authority, such error would not be dispositive of the case. The Federal Circuit's decision was based on the Board's failure to apply the plain meaning of the solicitation's licensing specifications. It was only in explaining what had apparently led the Board to commit its interpretational errors that the Board's authority was discussed. SMS' Petition, pp. 17a-18a, 37a-38a.

ingly forgotten in its decision granting the SMS protest. Apart from the fact that the Federal Circuit's decision does not affect the Board's recognized jurisdiction, that issue is not dispositive of the case. The interpretational issues, which are dispositive, are not important to anyone other than the litigants.

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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